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THE EFFECTIVENESS OF AUDIOVISUAL REGULATION INSIDE THE EUROPEAN UNION: THE TELEVISION WITHOUT FRONTIERS DIRECTIVE AND CULTURAL PROTECTIONISM

Joe Middleton*

I. INTRODUCTION

In early January of 2002, Jean-Marie Messier, the chief executive of French audiovisual giant Vivendi Universal, held a press conference to discuss his company's latest acquisition: American-based USA Network's media business.¹ During the conference, a French journalist asked Messier whether this latest \$10.8 billion purchase marked a shift toward the Americanization of French cinema.² While the answer to the question is debatable, Messier's response undoubtedly marks a shift in the attitude of the private audiovisual sector in France, and perhaps in the European Union as a whole. "The Franco-French cultural exception is dead," he declared, referring to the notion that media product is cultural product, and thus must be dealt with differently than other trade goods.³ The response was an immediate and overwhelming criticism of Messier and the initiation of an investigation, by France's highest administrative court, of Vivendi's shareholder

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1. See generally, Jo Johnson, *Defenders of French Culture Rally to Attack Vivendi Chief: Remarks by Jean Marie-Messier Have Renewed Fears About an Americanisation of French Cinema*, FIN. TIMES (London), Jan. 7, 2002; *The French Cultural Exception is Dead—Is It?*, FIN. TIMES (London), Jan. 15, 2002; James Harding & Jo Johnson, *Messier Gambles on a Showdown: The Vivendi Chief's Decision to Sack the Chairman of Canal Plus Leaves Him Badly Exposed in France*, FIN. TIMES (London), April 17, 2002; James Harding & Jo Johnson, *Vivendi's ego left facing fall-out from dual sacking: Unions Denounce Messier, Cultural Icons May Follow Suit and Investors May Seek Brakes on Chief Executive Over His Management Style*, FIN. TIMES (London), April 17, 2002.

2. James Harding & Jo Johnson, *Messier Gambles on a Showdown: The Vivendi Chief's Decision to Sack the Chairman of Canal Plus Leaves Him Badly Exposed in France*, FIN. TIMES (London), April 17, 2002.

3. A continuing source of conflict between the European Union and the United States has been whether audiovisual products are goods (the U.S. view) or, particularly in the broadcasting context, services (the E.U. view). See Jo Johnson, *Defenders of French Culture Rally to Attack Vivendi Chief: Remarks by Jean Marie-Messier Have Renewed Fears About an Americanisation of French Cinema*, FIN. TIMES (London), Jan. 7, 2002, *supra* note 1.

register to determine whether Vivendi's Pay-TV arm, Canal Plus, was more than 20 percent owned by non-European Union shareholders.⁴ After a turbulent summer at the helm of Vivendi, Messier stepped down under fierce criticism in early July.⁵

The drama may be lost on American film and television consumers. The American audiovisual industry has long enjoyed a position of dominance in the global market which has, in many respects, insulated American consumers from the kind of conditions inside the French and broader European markets that have resulted in a sort of audiovisual dysfunction amongst the family of European Union regulatory policies and Member State practices. The patriarch of this family, the Television Without Frontiers Directive⁶ (the "Directive") is under renewed scrutiny from the Commission which, in November of 2002, published a five-year evaluation of the Directive's effectiveness⁷ expected to stimulate a new debate in the coming months on possible amendments to the law.⁸ Messier's bell-tolling episode and the resulting political fallout in many ways encapsulates the underlying issues for audiovisual regulation inside the European Union. The French view of media as culture is in no way aberrant; it is pervasive throughout the European Union.⁹ On the other hand, the United States, whose audiovisual industry earned over \$530 billion in 2001 (more than 5 percent of the U.S. GDP) and exported \$90 billion in audiovisual product overseas in the same year,¹⁰ has consistently argued that while media products have a cultural component, they should be treated as goods rather than services for purposes of trade law.¹¹ This position is at odds with the Directive, which requires, among its other provisions,¹² quotas for the broadcasting of European programming and independent European production¹³—quotas which would clearly be illegal under the General Agreement

4. See *The French Cultural Exception is Dead—Is It?*, *supra* note 1.

5. In April of 2002, Messier fired Canal's chairman, Pierre Lescure, which led to even greater political fallout and placed Messier under fire from both shareholders and government officials. See *Messier Gambles on a Showdown*, *supra* note 1; See also Andrea R. Vaucher, *Messier: Yanks for the Memories*, VARIETY, July 15, 2002, at 6; Meredith Amdur, *Titan or Outcast? It's all in the Timing*, VARIETY, July 22, 2002, at 7.

6. Council Directive 89/552/EEC, 1989 O.J. (L 298) 23. [hereinafter the Directive].

7. Fifth Communication From the Commission to the Council and the European Parliament on the Application of Articles Four and Five of Directive 89/552/EEC, "Television Without Frontiers," as amended by Directive 97/36/EC, for the Period 1999-2000, COM(2002)612 final. [hereinafter the November Report of the Commission].

8. See Ian Hargreaves, *The Threat to Democracy: European Media Regulation is a Muddle*, FIN. TIMES (London), May 21, 2002 [hereinafter *The Threat to Democracy*]; Ian Hargreaves, *The Media and the Euro*, FIN. TIMES (London), June 12, 2002; Dawn Haynes, *A Closer Watch on all Channels: MEDIA: the European Commission's Review of the Directive on Television May Seek to Extend the Law to all Kinds of Networks*, FIN. TIMES (London), Nov. 18, 2002 [hereinafter *A Closer Watch on all Channels*].

9. See Lisa L. Garrett, *Commerce Versus Culture: The Battle Between the United States and the European Union Over Audiovisual Trade Policies*, 19 N.C.J. INT'L L. & COM. REG. 553, 555 (1994) [hereinafter *Commerce Versus Culture*].

10. See Pam McClintock, *Creative Cargo*, VARIETY, Apr. 29, 2002, at 9.

11. See *Commerce Versus Culture*, *supra* note 9 at 563.

12. The Directive also contains broad provisions for the regulation of advertising (Chapter IV) and for the protection of minors (Chapter V), subjects which are beyond the scope of this paper.

13. See The Directive, *supra* note 6 at arts. 4-6.

on Tariffs and Trade ("GATT").¹⁴

But in the wake of the Commission's five-year report, both the effectiveness and the purpose of the Directive are being questioned not just by the U.S. audiovisual industry, but by those inside the European Union as well.¹⁵ Messier's position embodies concerns within the European Union that liberalization of audiovisual regulatory policies is necessary in order to develop a more competitive European audiovisual sector. With the collapse of the public broadcasting model across much of Europe (including France) and its gradual replacement by commercial and pay-TV networks broadcasting a large quantity of American programming suffused with American culture, it seems likely that in order to address the cultural concerns embodied in the Directive, a more competitive European audiovisual industry is needed. One viewpoint is that the audiovisual sector need only be nurtured under European Union regulation in order for it to become more competitive.¹⁶ Another is that liberalization is the only way to compete.¹⁷

This is, essentially, the question the European Union must now resolve: whether protection of European culture is best accomplished by strengthening the Directive or by liberalizing regulation. The last proposals to amend the Directive in 1996 ultimately failed to shore up the loopholes its critics complain make it ineffective. Quota provisions were kept at a mandatory 50 percent rather than increased as some member states had called for, a proposal to eliminate the "where practicable" clause from article four was rejected, leaving implementation of the quotas themselves arguably non-mandatory, and an exception for sporting events, news, and games was retained, thus effectively allowing broadcasters to continue satisfying their quota requirements by broadcasting fare with, what some have argued, is relatively little cultural worth.¹⁸

Despite the implementation of the Directive, it seems that whatever threat to European culture lurked in American audiovisual sector in the mid 1980's is still there. Indeed, as media consumption inside the European Union has continued to grow, the only question seems to be in what form will American dominance of film and television next manifest itself. Given this dominance, how can the European audiovisual sector hope to remain a viable cultural force? One of the emerging threats to the effectiveness of the Directive—and if the preamble to the Directive is to be taken at face value, to European culture itself—is exhibited in the Vivindi-Universal fiasco of the past summer: the emergence of what Ian Hargreaves has called an "oligopoly of global media companies, based upon the

14. GATT applies only to trade in goods rather than services. For an excellent discussion of the history of GATT and the Television Without Frontiers Directive, see *Commerce Versus Culture*, *supra* note 9 at 553.

15. See generally, *id.*

16. *Id.*

17. *Id.*

18. See, e.g., Kevin M. McDonald, *How Would You Like Your Television: With or Without Borders and With or Without Culture—a New Approach to Media Regulation in the European Union*, 22 FORDHAM INT'L L.J. 1991 (1999) [hereinafter *How Would You Like Your Television*].

American entertainment industry.”¹⁹

Another threat is posed by the rapid development of new technologies not envisioned by the 1989 law. Television on demand, satellite broadcasting, and webcasting all threaten to eviscerate the meaningfulness of television broadcast quotas as these forms of media consumption compete more and more with traditional broadcasting.²⁰ The Commission is now considering two possible approaches to the technology problem: one is to simply keep the law confined to traditional television broadcasting and update various provisions such as the “where practicable” language of article four, the other is to recast the Directive so that it applies to all broadcast technologies.²¹

Regardless of the Commission’s recommendations, it is questionable whether the Directive can ever be effective. The market forces that are leading to the conglomeration of media companies in both the United States and the European Union cannot be effectively addressed by broadcasting legislation alone. Indeed, it is not clear that they should be. Furthermore, if the Commission recommends confining the Directive to the traditional television market, it is unclear that it can remain an effective tool for cultural preservation while the consumption of other forms of media—much of it dominated by non-EU culture—becomes more and more prevalent. Even if the Directive were overhauled to apply to novel media markets, and even if the new regulations go beyond the loopholes of the current law to create a truly effective regulatory scheme, it is doubtful that the legislative process can keep pace with technological development in the future. Furthermore, given the broad range of regulatory bodies which will have the task of implementing the directive inside individual member states, the dysfunction is likely to continue.²² In short, the Directive may be a failed proposition.

II. HISTORICAL BACKGROUND: THE AMERICAN POISON.

To appreciate the current situation, one must consider the circumstances leading to the implementation of the Directive in the mid and late 1980’s. It was during this period that the “American cultural threat” developed; American media exports, particularly television exports, now began to appear frequently in Europe. Many countries in Europe still had no experience with commercial broadcasting, having initiated and operated their television broadcasting services under a public model, and were wary of American style commercialism.²³ In many ways, the

19. See Ian Hargreaves, *The Threat to Democracy*, *supra* note 8.

20. See Dawn Haynes, *A Closer Watch on all Channels*, *supra* note 8.

21. *Id.*

22. Some member states, such as the United Kingdom, maintain a single regulatory body (the Office of Communications Regulation, or Ofcom, in the case of the U.K.) tasked with enforcing media regulations like the Directive, while others use a range of regulatory bodies. The argument on the one hand is that a central body is more efficient and therefore more effective. On the other hand, countries employing several regulatory bodies argue that it is easier to insulate the regulators from political influence by disbursing their responsibilities. See Ian Hargreaves, *The Threat to Democracy*, *supra* note 8.

23. See generally, KERRY SEGRAVE, *AMERICAN TELEVISION ABROAD: HOLLYWOOD’S ATTEMPT*

1980's became a coming of age era for commercial television in Europe. In Germany, the ZDF network was essentially forced to purchase cheap American programming—despite its assertion that German viewers preferred other fare—as a budget reduction coupled with inflationary woes forced the broadcaster to fill its air-time with American re-runs and feature films.²⁴ This scenario became increasingly common throughout the European Economic Community.²⁵

In France, the chorus of voices objecting to American media imperialism was just beginning to organize. In 1981, The Committee for National Identity placed an ad in *Le Monde* advocating that a pre-existing 50 percent quota for French films on television be raised to 60 percent.²⁶ Later that year, French Film director Gerard Blain characterized American media products as “the American Poison,” and asserted “it is by films made in Hollywood that America infuses its venom into the spirits of people, that it insidiously but deeply imposes its stereotypes and literally saps their life force.”²⁷ In the United Kingdom, on the other hand, a trend toward the liberalization of regulatory policies was beginning. Richard Collins has observed, “for the most part, the U.K.’s European audiovisual policy has been conspicuous by its absence.”²⁸ British officials often seemed to see the problem not as one of cultural imperialism on the part of the United States, but as one of ineffective competition or unassertiveness on the part of the U.K.’s audiovisual sector. “Why do we pay the Americans to show their TV schlock when they could be asked to pay to air ours?” asked British television executive Patrick Dromgoole.²⁹ In later years, the U.K. would export more television to the United States than any member state in the European Union.³⁰ The disparity between the British and French approaches would lead directly to some of the most ineffective aspects of the Directive.

Italy, like the United Kingdom, passively embraced, if not openly, advocated a liberal policy. The public broadcaster, RAI, operated three channels in competition with a relatively large commercial sector comprising around 400 outlets in 21 regional operations.³¹ In 1982 the vast majority of Italy’s imported feature films and made-for-television movies—over 77 percent—were American.³²

TO DOMINATE WORLD TELEVISION (1998) [hereinafter AMERICAN TELEVISION ABROAD]. In Holland, for example, air-time on two stations was divided between various politically and religiously affiliated broadcasters. Kerry Segrave observes, “In an attempt to warn Dutch viewers of the horrors of American-style commercial television, the Socialist Station, VARA-TV aired a ‘typical day’ of American television fare. It was meant to expose the ‘crass commercialism’ that could become more prevalent in Holland in the future . . .” *Id.* at 197.

24. *Id.* at 198.

25. *Id.*

26. *Id.* at 199.

27. *Id.* at 199-200.

28. Richard Collins, *The European Union Audiovisual Policies of the U.K. and France*, in TELEVISION BROADCASTING IN CONTEMPORARY FRANCE AND BRITAIN, 198, 198-99 (Michael Scriven & Monia Lecomte, eds., 1999).

29. See AMERICAN TELEVISION ABROAD, *supra* note 23 at 202.

30. See Collins, *supra* note 28 at 206-07.

31. See AMERICAN TELEVISION ABROAD, *supra* note 23 at 203.

32. *Id.* at 205. During 1982, Italy imported 1,827 feature films and made-for-TV movies, 1,418 of

By the end of 1982, there were three major commercial networks in operation on a national scale, two of which were owned by Silvio Berlusconi.³³ On the eve of the Directive, it seemed that Italy typified everything the French had feared. In 1987, the Italians imported \$300 million worth of foreign television programming, 80 percent of which came from the United States,³⁴ and Berlusconi's stations broadcast about 62 percent American product.³⁵

The situation in the rest of Europe was much the same. Total U.S. television exports to Europe in 1987 were about \$675 million, or 56 percent of total export volume.³⁶ In the then 12 European Community nations, at least 25 percent of all programming hours came from U.S. producers.³⁷ An American market research company predicted that by the early 1990's that figure would increase to around 40 percent.³⁸ By 1989 the U. S. generated a stunning total of \$1.7 billion in offshore television sales, much of it destined for Europe.³⁹ In response to the growing domination of American television programming on European networks and to the perceived threat this posed to the preservation of European culture, the Commission issued its first Green paper on the matter in 1984.⁴⁰ This paper expressed the basic principles which came to guide formation of the Directive, and constituted the basis for the first proposal for legislation in 1986.⁴¹ The new proposal advocated the preservation of European culture through the use of a relatively moderate quota provision requiring only that European broadcasters reserve 30 percent of their airtime for European works.⁴² The Council and Parliament debated the issue for the next three years before finally adopting the Directive in October of 1989.⁴³

III. BASIC PROVISIONS OF THE DIRECTIVE.

The Directive addressed three different fields: the protection of minors, the regulation of advertising, and the protection of European culture through the means

which were from the United States. *Id.* The next largest competitor for Italy's import market was the United Kingdom, which exported 133 films to Italy. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 207.

36. *Id.*

37. See AMERICAN TELEVISION ABROAD, *supra* note 23 at 207.

38. *Id.*

39. *Id.* at 263.

40. See generally, Commission of the European Communities, Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable, COM (84) 300 final [hereinafter 1984 Green Paper].

41. Shaun P. O'Connell, *Television Without Frontiers: The European Union's Continuing Struggle for Cultural Survival*, 28 CASE W. RES. J. INT'L L. 501, 504 (1996) [hereinafter *Continuing Struggle*]; Proposal for a Council Directive on the Coordination of Certain Provisions Laid Down by Law, Regulation of Administrative Action in Member States Concerning the Pursuit of Broadcasting Activities, 1986 O.J. (C179) 4.

42. See *Continuing Struggle*, *supra* note 41 at 504.

43. *Id.*

of quotas for the broadcasting of European works.⁴⁴ Only the quota provisions are dealt with here. The new legislation was, in some aspects, more stringent than the Green Paper's initial recommendations, mandating that "broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time . . ."⁴⁵ Though this was a disappointment to some who had advocated a more robust 60 percent requirement, it was a marked change from what legislators, who had witnessed the rapid onslaught in their audiovisual sectors, had recommended a few years earlier.⁴⁶ Article 6 laid down what seemed to be relatively simple guidelines for determining whether a work was of European origin. In summary, a work satisfied the requirement if it: 1) originated in a Member State, or 2) originated in other European states who were parties to previous legislation regulating television broadcasting.⁴⁷ Furthermore, the works must either 1) be made by "one or more producers established in one or more of those States," or 2) "supervised and actually controlled by one or more producers established in one or more of those States," or 3) "the contribution of co-producers of those states to the total co-production costs" must be "preponderant," and the "co-production must not be controlled by one or more producers established outside those States."⁴⁸ Of course, as could be expected, the specifications for European works would come to be a point of tension in future years.

Two other key aspects of the Directive should be noted. First, article four, which lays out the basic quota provisions, specifies that quotas should be required only "where practicable and by appropriate means."⁴⁹ This provision has been criticized for weakening the quota provisions to the point where they are meaningless.⁵⁰ Second, article four allows Member States to exclude broadcast time for sporting events, news, games, advertising and teletext services from the airtime to which quotas must be applied.⁵¹ This provision has been criticized by many who feel it allows for the satisfaction of quota requirement by broadcasting material with little cultural worth.⁵² Together, the "where practicable language," the exemption for news and games, and the difficulty in defining and assuring that a work is of European origin constitute the major weaknesses of the Directive.⁵³

44. See The Directive, *supra* note 6 at art. 4-22.

45. *Id.* at art. 4, ¶ 1.

46. Of course, the 50 percent requirement is only a floor, and individual Member States remain free to establish more rigorous quotas. This is the case in France, which demands that 60 percent of airtime be reserved for works of European origin.

47. The Directive, *supra* note 6 at art. 6, ¶ 1. Section (b) refers to non-member States who are parties to the European Convention on Transfrontier Television.

48. See *Id.* at art. 6, ¶ 2.

49. See *Id.* at art. 4, ¶ 1.

50. See, e.g., *How Would You Like Your Television*, *supra* note 18 at 2008 (referring to the quota provisions as "toothless").

51. See the Directive, *supra* note 6 at art. 4, ¶ 1.

52. See e.g., *How Would You Like Your Television*, *supra* note 18 at 2006.

53. *Id.*

IV. CULTURAL DOMINANCE THROUGH MEDIA: THE CASE FOR QUOTAS.

From the viewpoint of those who initiated and eventually legislated for the Directive, it was a necessary response to the rapidly changing dynamics of broadcast television in Europe during the late 1980's and early 1990's. The necessity can be understood from two perspectives—one directly resting on cultural concerns (a view embracing quota provisions more directly as an end in themselves) and the other incorporating the intermediate assertion that strong competition from the European audiovisual sector is necessary to stem the influx of American programming, which will in turn protect European culture (a view embracing quota provisions more as a means to effectuate a purpose).

Among the underlying assumptions of both perspectives is the view that media is culture—a fairly uncontroversial proposition. Thomas Bishop, for example, has argued that “film and television are crucial conveyors of cultural express—in fact the most widely applied means of transporting a nation's culture at the end of the twentieth century.”⁵⁴ More controversial is the implication that the vectors of cultural influence somehow operate more efficiently moving in the direction from the media to the broader cultural body.⁵⁵ This view emphasizes the potential threat imposed by the media upon culture rather than understanding the media as a reflection of culture. Of course, the advocates of quotas would question whose culture is being reflected, and probably conclude that it is the culture of America, and not even a very broad sector of that culture. Another question is then ripe for the asking: if American programming is coming to dominate broadcasting in Europe, is it because of American cultural imperialism or because Europeans prefer to view American (or at least American style) programming?

The latter proposition is highly doubtful. Jack Valenti, the former president of the Motion Picture Association of America has argued that Europeans prefer American programming, claiming that Europeans “like, admire, and patronize what we offer them.”⁵⁶ Valenti has further asserted that the European taste for American programming is evidence of the true motives of the European Community, claiming, “the E.C. objection [to the dominance of American audiovisual product] has nothing to do with culture. What it is really about is commerce. The only way to force citizens not to watch American programs is to keep those programs off the air.”⁵⁷ But the converse is probably more accurate: the only way to force European Union citizens to watch American programs is to keep them on the air. In 1990, at the height of the perceived cultural crisis, for example, a London based research firm, CIT concluded, “type for type domestically produced shows usually received better ratings than U.S. imports.”⁵⁸ Another study found that “most U.S. material is not suited to a European audience and has

54. Thomas Bishop, *France and the Need for Cultural Exception*, 29 N.Y.U.J. INT'L L. & POL. 187 (1997).

55. *See id.*

56. *See* AMERICAN TELEVISION ABROAD, *supra* note 23 at 258.

57. *Id.*

58. *Id.*

weaker ratings than similar domestic fare.”⁵⁹ There are certainly other forces that can account for the pervasiveness of American audiovisual product inside the European Union.⁶⁰ More importantly, those forces may account for the ineffectiveness of the Directive as well. While some of these questions are more properly addressed in a paper of their own, they are important ones to keep in mind while assessing the arguments for cultural protectionism, whether they view quotas as an end point or a starting point.

Perhaps the best embodiment of the case for quotas is found in the French perspective. Judith Beth Prowda has observed, “France, with the leading film industry in Europe, has become the self-appointed defender of European culture.”⁶¹ The French have expressed their wariness of the American cultural invasion through legislation on other fronts than the audiovisual. The Loi Toubon (1994) for example effectively banned the use of English (or other language) words in all official and most commercial contexts,⁶² thus attempting to safeguard the French language, considered by many to be France’s greatest cultural resource.⁶³ Inspired by the Loi Toubon, another regulation went into effect in January of 1996 implementing a 40 percent quota for French songs between the hours of 6:30 AM and 10:30 PM on French music stations.⁶⁴ From the French perspective, the justification is that without such cultural protectionism, French culture (and in the context of the Directive, European culture) would wither.⁶⁵ Indeed, these fears often seem bolstered by reality. If French protectionism of the audiovisual sector sometimes appears questionable, it is only fair to remain cognizant of statistics observed by industry critics like Richard Collins, who notes French author P. Moeglin’s findings that in 1990, “of twelve transnational European television channels, five transmitted in English,” and of “ninety-six national and regional television channels in the European Community, twenty-four used English, more than used any other single language.”⁶⁶

It is important to remember that the French in no way embody the thinking of all Member States. In countries like Italy and the United Kingdom, the concern is quite different. These countries are better characterized by saying that they advocate a system of quotas primarily as a means to protect commercial concerns, and that cultural protection is the secondary goal, maybe even incidental. Collins observes, “it would be too neat to state that the U.K. has been the principal proponent of liberalisation and France the principal opponent . . . better to say that

59. *Id.* at 259.

60. *Id.*

61. Judith Beth Prowda, *U.S. Dominance in the “Marketplace of Culture” and the French “Cultural Exception,”* 29 N.Y.U.J. INT’L L. & POL. 193, 199 (1997) [Hereinafter *U.S. Dominance*].

62. *Id.* at 206.

63. *See id.* Toubon himself, for example, explained that “this law is not an attack on English, but an attempt to preserve this [French] language, this irreplaceable capital. If it is not preserved, it will die.” *Id.*

64. *Id.*

65. *See generally, id.*

66. *See Collins, supra* note 28 at 212-13.

the U.K. has gone with the flow of the policies of integration and liberalisation.”⁶⁷ Collins argues that the U.K.’s tack often coincides with the goals of countries like Germany and Denmark who sometimes favor liberalization as a counterweight to what they feel are encroachments on independent liberties and freedom of speech imposed by creeping E.U. regulation.⁶⁸ Italy, like the United Kingdom, deregulated early,⁶⁹ and has used a single regulatory body to oversee both broadcasting and telecommunications, managing a private sector that has often broadcast more American than European content. In characterizing the stance of countries like the United Kingdom and Italy, the importance of competitiveness first cannot be overlooked. Of course, neither can the language factor in the case of the United Kingdom, which manages to export more programming to America⁷⁰ and more programming to the rest of the European Union than any other Member State.⁷¹ Some have argued that this success is not the result of liberal British regulatory policies making the British audiovisual sector more competitive, but simply the fact that Americans are loath to suffer through dubbed or subtitled product⁷² as well as the fact that English is widely spoken on the continent.

But there is another persuasive argument for the maintenance of the Directive that is ostensibly independent of any political or cultural rationale: there is at least some evidence that it has actually been effective. The terms of the Directive mandate a periodic report on its effectiveness.⁷³ The report covering the period between 1997 and 1998 found a significant increase in the broadcast of European works during this period, and that the major French, German and Italian channels were broadcasting around 70 percent European content.⁷⁴

The most recent report, issued in November of 2002 and covering the years 1999-2000, was largely a positive review of the Directive’s effectiveness.⁷⁵ The Commission came to four general conclusions. First, the Commission observed that the total number of channels had increased significantly during the period in question.⁷⁶ Second, The Commission concluded that, generally, average transmission time reserved for European works by channels with the highest viewer ratings grew during the period in question.⁷⁷ More specifically, the proportion of European works actually broadcast, in terms of number of channels,

67. *See id.* at 199.

68. *Id.*

69. STYLIANOS PAPATHANASSOPOULOS, EUROPEAN TELEVISION IN THE DIGITAL AGE: ISSUES, DYNAMICS AND REALITIES 15 (2002) [hereinafter EUROPEAN TELEVISION IN THE DIGITAL AGE]. The United Kingdom actually deregulated in 1954. Though Italy followed some twenty-two years later, no other country in Europe deregulated until 1982. *Id.*

70. *See* Collins, *supra* note 28 at 206-07.

71. *Id.*

72. *See U.S. Dominance, supra* note 61 at 201.

73. *See* The Directive, *supra* note 6 at art. 4, ¶ 6.

74. *See* EUROPEAN TELEVISION IN THE DIGITAL AGE, *supra* note 69 at 18.

75. *See generally*, November Report of the Commission, *supra* note 7.

76. *See* the November Report of the Commission, *supra* note 7 at 5-6. According to the Commission, the total number of channels to which articles four and five of the Directive apply increased from approximately 550 in January of 1999 to around 820 in January of 2001. *Id.*

77. *Id.* at 7.

increased in twelve Member States, remained stable in one, and fell in two.⁷⁸ Third, the Commission concluded that the number of Member States achieving the “majority proportion of their transmission time of European works” was growing steadily.⁷⁹ During the years in question, the average compliance rate among all European channels in all Member States increased by 3.93 percent.⁸⁰ Finally, the Commission found that the scheduling (as opposed to actual broadcast) of European works increased during the period in question in fourteen Member States.⁸¹

Taken at face value, the Commission’s report would seem to suggest that the Directive is achieving its goal of at least increasing the amount of European material broadcast on European air waves, if not the goal of protecting European culture itself (it is important to keep in mind, after all, that this is the goal specifically set out in the Directive’s preamble).⁸² However, there are some important qualifications to the data. Most obviously, and perhaps most significantly, the Commission itself recognizes that the data are incomplete, explaining that “some Member States still failed to provide full information, particularly with regard to cable and/or satellite television channels (which are often omitted from national reports).”⁸³ In fact, before discussing most of its conclusions, the Commissioners felt obligated to reiterate the exclusion from their evaluation of much information concerning cable and satellite channels.⁸⁴ Quite often, the Member States simply omitted these data from their reports to the Commission.⁸⁵ This omission is significant because satellite and cable channels are arguably the two fastest growing formats for broadcasting⁸⁶; an assessment of the Directive’s effectiveness which focuses on terrestrial broadcasting while largely ignoring these formats is anachronistic. As we will see, satellite broadcasts pose particularly difficult challenges to the achievement of the Directive’s goals. At best, the Commission’s most recent report glosses over this fact; at worst it is rendered largely irrelevant by it.

Another important factor in evaluating the Commission’s data is the exclusion of statistics for channels that commanded less than a three percent audience share during the period in question.⁸⁷ As the number of channels increases dramatically (an observation made by the Commission itself) the audience share of each channel

78. *Id.*

79. *Id.*

80. See the November Report of the Commission, *supra* note 7 at 7.

81. *Id.*

82. See generally, *id.*

83. *Id.* at 6.

84. See, e.g., The November Report of the Commission, *supra* note 7 at 23, 25. For example, both the Commission’s “General Considerations” regarding the requirement to broadcast a majority proportion of European works as it functioned at a national level, and the assessment (at the community level) of the requirement for broadcasting of works by independent producers are qualified with the observation that satellite and cable channel data are often simply omitted from the reports of individual Member States.

85. *Id.* at 6.

86. *Id.*

87. See *id.* at 7, n.14.

will necessarily diminish. Over time, less data will be involved in the Commission's assessments. Arguably, the statistics for the 2002 report (which considered 820 channels) are less reliable than those for the 2000 report (which considered only 670). Furthermore, should the Directive be amended to apply to non-traditional media platforms like direct TV and TV on demand (one of the options currently up for consideration), the exclusion of channels with less than a three percent audience share will necessarily work to exclude a vast proportion of the material broadcast inside the European Union.

Furthermore, the report is often simply spun in a direction favorable to the Commission. Factors the Commission interprets as indicating a slight improvement can also be interpreted to indicate a negative trend, calling into question their meaningfulness. For instance, though the conclusions of the Commission are, broadly speaking, positive concerning the overall compliance rate⁸⁸ (defined as the percentage of channels achieving or exceeding the majority proportion requirement⁸⁹), it should be noted that the country which saw the greatest growth in number of channels (the United Kingdom⁹⁰) also saw the second lowest growth in its rate of compliance, which actually fell by two percent.⁹¹ More broadly speaking, the compliance rate either did not grow or actually decreased during the period in question in six of the fifteen Member States.⁹² Taken together, the incompleteness of the data, its limited nature and its questionable interpretation cast doubt on the accuracy of any of the Commission's conclusions.

V. MARKET FORCES: THE MAJOR CHALLENGE TO EFFECTIVE CULTURAL PROTECTIONISM.

There are two implicit positions from which the Directive is advocated: one embraces a quota system as a direct method of insuring the protection of European culture, while the other finds that cultural protection is probably best effectuated by economic means.⁹³ But the proponents of quotas as a method of nurturing the European audiovisual sector often seem to confuse the legitimacy of the goal of cultural protection with the means used to achieve that goal. It is difficult to contradict the assertion that European culture should be acknowledged, preserved—even revered. The question of whether those goals can be achieved through the imposition of television broadcast quotas, however, is a murky one at best. Given the economic forces that shaped the European broadcast environment in the 1980s and their continued persistence, it seems unlikely.

Of course the question to ask is why, even in countries like France that stands staunchly opposed to the American television invasion, was American

88. *Id.* at 41.

89. *Id.* at 9.

90. *Id.* This fact is even more significant when one considers that the United Kingdom produced 19 of the total of 48 new channels produced throughout the E.U. during the period in question. *Id.*

91. *Id.*

92. *Id.* Growth was static in Austria, Germany, Ireland, and Finland. Growth was negative in Denmark (-8.6%) and the United Kingdom (-2.0%).

93. See *Commerce Versus Culture*, *supra* note 9 at 562-570.

programming in the 1990's becoming easier and easier to find? Why, despite a 60 percent quota for European Community programming, was its television industry gradually becoming more and more commercial and typifying all the things it had feared? Several political and economic forces can be identified which are arguably the root-cause of the European television transformation. First, the so-called "Iron Law" of television,⁹⁴ which dictates that liberalization leads invariably to a flood of cheap imports.⁹⁵ As the European broadcast industry deregulated and became more privatized, newcomers to the marketplace found it difficult to compete with established broadcasters. More and more they found themselves faced with a choice of paying astronomical costs for European productions or filling their airtime with extremely cheap U.S. imports. To stay afloat, they chose the latter option.⁹⁶ Second, the early focus in most European countries on establishing state broadcasters resulted in a focus on preventing state-monopolies and resultant abuses of power.⁹⁷ This can be contrasted with the United States, which was more concerned with maintaining a competitive economic marketplace.⁹⁸ That focus arguably led to an American audiovisual sector that could simply outperform the Europeans in economic terms. Perhaps most importantly, the audiovisual sector in Europe (and the United States) is experiencing a wave of concentration that leaves production in the hands of ever larger conglomerates whose joint ventures with American interests and increasing need to be competitive ultimately result in homogeneous or Americanized product. Finally, convergence is operating not just in economic, but also in technological pathways, forcing regulatory legislation to adapt or become ineffective.

The key question overlying all of these problems is whether the Directive can effectively protect European programming from assuming a smaller and smaller corner of the market. More important and more problematic is the question of whether it can preserve anything recognizably European in the European programming that manages to compete successfully with inexpensive American fare.

A. Economic Realities of Production and Market Entry

It cannot be doubted that the American audiovisual industry, particularly the television industry, had the good fortune of maturing early. The advanced state of America's private broadcast sector allowed Hollywood to achieve a sophistication (at least in economic terms) and efficiency in its production that Europe arguably still has not managed.⁹⁹ Raymond Kuhn and James Stayner observe, "For much of

94. See *How Would You Like Your Television*, *supra* note 18 at 2010-11.

95. *Id.*

96. *Id.*

97. See Harvey B. Feigenbaum, *New Forms of Governance: Ceding Public Power to Private Actors: Public Policy and the Private Sector in Audiovisual Industries*, 49 UCLA L. REV. 1767, 1770-72 (2002) [hereinafter *Public Policy and the Private Sector in Audiovisual Industries*].

98. *Id.*

99. See Raymond Kuhn & James Stayner, *Television and the State*, in TELEVISION BROADCASTING IN CONTEMPORARY FRANCE AND BRITAIN 2, 2 (Michael Scriven & Monia Lecomte,

television's history the state [in Britain and France] strictly controlled market entry, with the result that the growth in the supply of television was slow and incremental."¹⁰⁰ Britain and France were by no means anomalous. One result of this is that production costs in America compared with those inside the European Union are startlingly small. In 1986, at the height of the first deregulation phase in Europe, the average cost of producing a one-hour drama in Europe was around \$4 million.¹⁰¹ In the United States it was only \$350,000.¹⁰² More to the point, while newcomers to the private sector like Italy's RAI could spend the \$4 million to develop a new one-hour program with European producers, actors, writers and directors, they could also opt to purchase a one-hour program from the Americans for around \$12,000.¹⁰³ Assuming for the sake of argument that Italians didn't care for American programming, at these prices it didn't matter. RAI could afford slightly lower ratings if it meant its overall broadcast costs were that much lower. What it could not afford was to produce European material. Italy was not alone; the situation was much the same throughout Europe. In 1989 the *New York Times* observed, "European television stations can buy rights to an hour-long American show for less than one-tenth the cost of financing an hour-long domestic production."¹⁰⁴

In the European film industry, things may be worse. The industry is important to the television market and therefore important in assessing the effectiveness of the Directive for at least two reasons. First, film production is often financed by television broadcasters¹⁰⁵ and second, film accounts for a large proportion of programming on European television stations.¹⁰⁶ Unfortunately, between 1970 and 1990 film production slumped from a high of 778 features to just 500.¹⁰⁷ Given the enormous lag in production capabilities between the United States and the various members of the European Union, it seems fair to assume these forces will operate, both in film and television, for quite some time.

Kevin McDonald has argued that we can expect more struggle along these lines in the European audiovisual sector as more and more private, commercial, and pay-TV channels sprout in the deregulated hothouse of the Union.¹⁰⁸ New networks, he argues, must invariably purchase the cheaper imports in order to

eds., 1999). While Britain privatized in 1954 with the introduction of Independent Television (ITV), the effect of introducing one channel was negligible. France, on the other hand, effectively maintained a state monopoly on broadcasting until the 1980's. *Id.*

100. *Id.*

101. See AMERICAN TELEVISION ABROAD, *supra* note 23 at 200-01.

102. *Id.*

103. *Id.* at 205.

104. See Steven Greenhouse, *The Television Europeans Love and Love to Hate*, N.Y. TIMES, Aug. 13, 1989, at 24.

105. See generally, Anne Jackel, *Broadcasters' Involvement in Cinematographic Co-production*, in TELEVISION BROADCASTING IN CONTEMPORARY FRANCE AND BRITAIN 175, 175-96 (Michael Scriven & Monia Lecomte, eds., 1999).

106. See generally, *id.*

107. See *How Would You Like Your Television*, *supra* note 18 at 2009-10.

108. See generally, *id.*

compete with the already established networks doing the same thing.¹⁰⁹ As the number of networks increases, programming becomes more expensive, driving stations to spend more on imports and leaving them with even less for original production.¹¹⁰ The consequence of all this, of course, is that more American programming fills more European airtime. The airwaves are full of homogenized American product and low-quality European product as a result of drained budgets. This is the so-called "Iron Law" of television, and it results, McDonald argues, in a cultural uniformity which blots out difference and threatens European language and identity.¹¹¹

This is one face of the schizoid European audiovisual policy. As the marketplace itself moves toward privatization and liberalization, how can the European Union realistically expect to maintain regulatory policies that move in the opposite direction? If cheap content is needed and the only source of that content right now is low-brow American programming, so loathed by the Commission that it is in many respects out-lawed, then how can European networks hope to satisfy their quota requirements and remain economically viable?

One answer, ironically, is that European media corporations have become much more like their American counterparts. Television companies in Europe now more resemble American corporations than they do their public-model parents.¹¹² Film production, on the other hand, has increasingly become more of a global rather than a national endeavor, and is now commonly executed in multiple countries with multinational crews.¹¹³ Examples of this phenomenon include *The Fifth Element*, *Enemy at the Gates*, and *The Lord of the Rings*.¹¹⁴ This situation makes the article six provisions defining what constitutes a European work largely irrelevant.

Alliances between media companies are beginning to sprout and, argues Harvey Feigenbaum, are in some ways shaping national cultural policy by themselves quite successfully.¹¹⁵ What is more, the number of these alliances continues to grow, further weakening the distinction between American and European works. Examples include Sony pictures, which signed a \$60 million deal with Germany's Babelsberg Studios as well and beleaguered Vivindi, which now owns Seagram's Universal along with Canal Plus and, since January of 2002, USA Network's media business.¹¹⁶ Article six of the Directive aside, cross-pollination on this scale casts doubt on any attempt to define a European Work.

With American television shows like *Big Brother* and *Survivor* selling not individual episodes but, rather, their bare formats to European producers,¹¹⁷ even

109. *Id.* at 2010-11.

110. *Id.*

111. *Id.* at 2011-13.

112. See *Public Policy and the Private Sector in Audiovisual Industries*, *supra* note 97 at 1776-77.

113. *Id.*

114. *Id.* at 1779.

115. *Id.* at 1778.

116. *Id.* at 1779.

117. *Id.*

point systems like those delineated by the European Convention of Cinematographic Co-production¹¹⁸ seem likely to prove ineffective. Would the political infighting and bickering of an all-European cast on a French island somewhere in the Mediterranean directed by an Italian and jointly funded by British and German media conglomerates be a European work? Answering 'yes' to the question, as one must under the guidelines of the Directive, illustrates the problem. The Commission might call such works European, but the protection of European culture is slowly losing meaning as that culture is itself transformed—partly by economic forces and partly by viewers themselves. Even if programming itself is not American, in the highly competitive new European audiovisual sectors, selecting the right programming resembles a more American process, leaving the average hour of airtime more commercialized and more revenue oriented. It has become "a central and strategic function for the most part inspired by the American example: programs [are] designed or purchased in keeping with goals determined by audience ratings."¹¹⁹ This phenomenon is beyond the reach of the Directive, which makes no distinction between crass American commercialism and crass European commercialism.

The problems posed by alliances between European and American media corporations are mirrored internally by the problems posed by convergence within The European Union's audiovisual sector. More and more, programming diversity is being sacrificed for streamlined competitiveness among the shrinking number of media corporations. Again, the effect is to give Europeans a more American-looking product. Media conglomerates based inside the European Union are faced with the additional difficulty of translating their products across multiple language barriers. The result is often an end product that favors action over plot and movement over dialogue. The other alternative is to favor English, which, though spoken widely, effectively alienates non-English speakers and countries like France who view the provisions of the Directive as one of the key tools in their arsenal to protect their own language.

Merger activity in the sector is widespread and occurs on a significant economic scale. In 1996, for example, German media giant Bertelsmann merged with Compagnie Luxembourgeoise de Télédiffusion (CLT) to form CLT-Ufa, which came to dominate the German audiovisual marketplace.¹²⁰ The first half of 2000 saw merger activity of around \$35 billion with notable deals including the merger of CLT-Ufa with Pearson TV, ProSieben with Sat1 in Germany, and the takeover of Dutch production company Endemol Entertainment by Telefonica.¹²¹ Other mergers included Kirch (Germany) with BSkyB (United Kingdom), which

118. See Council of Europe, European Convention on Cinematographic Co-Production (ETS No. 147) at appendix II. This provision of the Convention awards points for various European elements of a production, requiring a minimum point total in order for the work to satisfy the definition of a European co-production.

119. Regine Chaniac, *Two Programming Models*, in TELEVISION BROADCASTING IN CONTEMPORARY FRANCE AND BRITAIN 58-70, 59 (Michael Scriven & Monia Lecomte, eds., 1999).

120. EUROPEAN TELEVISION IN THE DIGITAL AGE, *supra* note 69 at 107.

121. *Id.* at 108.

was cleared by the European Commission in March of 2000,¹²² and the takeover of Canalsatellite Numérique in France by Canal Plus and Lagardère in June of the same year.¹²³

In January of 2002, the European Union reaffirmed its commitment to a strengthened audiovisual sector, explaining that the media "constitutes not only an expression of creativity, particularly of identities, and a fundamental means of promoting democracy, but also an economic activity of growing importance,"¹²⁴ a statement which captures the two conflicting influences at work within the Union and the audiovisual sector. From one perspective, the Commission is charged with eliminating barriers to competition within the Economic Community. From another, it often assumes responsibility for safeguarding the cultural heritage of the European Union. In purely economic terms, this has translated into the situation Stylianos Papathanassopoulos has observed: "The Commission, on the one hand, favours mergers, acquisitions and the creation of joint ventures to provide new television (notably pay-TV) services," he argues, "and, on the other, examines whether these moves can eliminate competition. This is not an easy task, since the one goal contradicts the other."¹²⁵ Furthermore, it seems unlikely, in the face of piecemeal regulation, that the Commission can do much to stop the decline in the number of competitors. "In short," argues Papathanassopoulos, "the European Union seems powerless to regulate the issue of concentration, apart from scrutinizing the mergers and acquisitions under the competition law."¹²⁶ While the Directive is not intended to regulate competition or insure that mergers and acquisitions occur in a democratic fashion, it is unquestionable that the effectiveness of the Directive is impacted by the trend of convergence.

B. Technological Complications.

There is an impact not only from convergence in the traditional sense, but also from technological convergence, both in terms of service and content. From the service angle, companies that previously operated exclusively in one form of media are expanding their activities into new media realms. Cable companies are providing telecommunications service and Internet access, while Internet service providers are delving into the traditional territory of the television broadcaster, offering services like TV on demand and web TV.¹²⁷ Patrick Vittet-Philippe argues, "functioning traditionally on separate markets, these players are now increasingly encroaching on each other's turf. In all cases, these new services are

122. See Commission Decision of 21/03/2000 Declaring a Concentration to be Compatible with the Common Market (Case no IV/M.0037-*/*** B SKY B/KIRCH PAY TV) according to Council Regulation (EEC) No 4064/89, 2000 O.J. (C 110).

123. See EUROPEAN TELEVISION IN THE DIGITAL AGE, *supra* note 69 at 122.

124. See Council Resolution of 21 January 2002 on the Development of the Audiovisual Sector, ¶ a, 2002 O.J. (C 032).

125. See EUROPEAN TELEVISION IN THE DIGITAL AGE, *supra* note 69 at 117.

126. *Id.* at 115.

127. See Patrick Vittet-Philippe, *Beyond Digital Television*, in TELEVISION BROADCASTING IN CONTEMPORARY FRANCE AND BRITAIN, 120, 124-25 (Michael Scriven & Monia Lecomte, eds., 1999).

considered a strategic extension of core competence and a crucial source of revenues in the years to come.¹²⁸ Some commentators suggest that the traditional European television market will soon face stiff competition from entertainment offered over the web.¹²⁹ The response from European media corporations like Canal Plus is to offer a so-called digital multimedia broadcasting as a cheap means to implement broadband distribution of video and high-speed data.¹³⁰

From the content angle, these companies are not just shaping how media is consumed, but what media is consumed. One way this is happening is through the development of interactive television scenarios which essentially combine browser like features with television style content.¹³¹ The opposite approach is being taken by computer-based media companies offering video through the Internet.¹³² Both scenarios not only provide access to content, but actually shape content according to the medium through which it is offered.

These new 'broadcast platforms' provide a particularly vexing problem for legislation aimed at cultural protection. As it is, the Directive does not directly address any quota for European content on cross-media platforms. From a practical standpoint, how could such regulation ever be effective? Furthermore, there are other complicating factors such as the difficulty in regulating satellite broadcasts. Kerry Segrave's observation that "it will become very difficult if not impossible, to police the reception of satellite television"¹³³ might just as well be applied to the other new media platforms currently being developed by companies like Canal and MSNBC. The Commission's observation that even now many Member States do not provide complete data on satellite transmissions for purposes of assessing the Directive's effectiveness is a foreshadowing of difficulties to come. The basic problem is fairly simple: as more audiovisual consumption is carried out in the realm beyond terrestrial television, the Directive's focus must move into that realm or the Directive itself will become increasingly irrelevant.

This is one of the larger problems the European Union faces as it begins to debate possible changes to the Directive in the coming months. One option is to leave things as they are and possibly attempt other regulation aimed at the new media. Currently, when consumers watch programming that must be downloaded, like that available from video-on-demand and mobile video service, they are considered to be in a regulation free zone.¹³⁴ Another option is to extend the Directive so that it applies to all networks whether they broadcast by traditional means, satellite, or via some kind of new media platform. While this sounds attractive, its implementation could take years, during which time further technological complications will undoubtedly force another reconsideration of the

128. *Id.*

129. *Id.*

130. *Id.* at 125.

131. *See id.* at 124-25.

132. *Id.*

133. AMERICAN TELEVISION ABROAD, *supra* note 23 at 249.

134. *See A Closer Watch on All Channels*, *supra* note 8.

effectiveness of the legislation. Given the inevitable lag between technological innovation and legislative response, it seems reasonable to suppose a corresponding lag between legislative response and effective legislative response. The problem casts doubt on the ability of any quota system, however broadly applied, to effectively dictate European content.

VI. CONCLUSION

Arguably, in heralding the death of the Franco-French cultural exception Jean Marie-Messier was doing nothing more than reporting on the state of the audiovisual marketplace. A policy that attempted to exclude audiovisual products from the constraints of GATT and WTO efforts at free trade—a policy that justified a quota regime on grounds that they applied to cultural services rather than economic products—seems to make little sense in the current climate. The Commission seems to favor concentration in the audiovisual sector in the hope that it will create a more competitive industry within the Union. Ironically, the very policies designed to enhance the cultural content of European airwaves are now working as a barrier to companies seeking to become more competitive. As European audiovisual companies try to enhance their market share, they increasingly find they must do so by crossing borders to form alliances with other companies. Yet this is increasingly difficult in light of the Directive's provisions. As Vivindi, for example, acquired its interest in USA Networks, the old forces of cultural protectionism swept in to hamper the process. On the one hand, the European Union embraces a more competitive audiovisual sector as a means to protect European culture. On the other, the Directive, with its quotas and definitions of what constitutes European works, makes it difficult for the audiovisual sector to form the alliances it must in order to reach parity with the Hollywood machine.

More importantly, convergence within the audiovisual sector is leading to a loss of plurality and a homogeneity of exactly the sort feared by the innovators of the Directive. European culture is not simply threatened by external forces, but is susceptible to erosion from within as well—a process that the Directive is powerless to deal with. While the Commission's 2002 report on the effectiveness of the Directive, might support the bare conclusion that more European works are being broadcast inside the Member States (a conclusion with which it is easy to take exception), it cannot refute the fact that the quality of that programming is changing—probably for the worse. European culture, never a well-defined concept to begin with, is becoming the culture of those Member States who have the most competitive media corporations—France, the United Kingdom, and Germany. After the Union's recent expansion, it is particularly appropriate to question whether the American cultural imperialism of the 1980s and 1990s will look any different from the coming culture clash between the comparatively well-developed audiovisual sectors of Western Europe and the embryonic sectors of the new Member States.

Finally, convergence in the technological realm continues to effect both the context and content of media consumption inside the European Union. Regulation

in this realm is virtually nonexistent now and, at best, can hope only to lag significantly far behind the pace of change. As more and more consumers turn to media platforms outside the traditional television broadcast scenario, the Directive will come to resemble the flailing of a traffic cop in a deserted parking lot. The effectiveness of the Directive must be evaluated independently of any claims to the success of its individual provisions. It must be evaluated on the basis of whether or not it can succeed at the goal set forth in its preamble—the protection of European culture. In light of the difficulties set forth above, this seems doubtful.

UPDATE

In December 2003, the Commission Published *The Future of European Regulatory Audiovisual Policy*,¹³⁵ a communication from the Commission to the Council and other EU governing bodies describing recent changes in the European audiovisual marketplace and conglomerating the findings of the Fourth Report on the Application of the Directive¹³⁶ as well as the European Parliament's recent "Report on Television without Frontiers."¹³⁷ The Commission has concluded, "the Directive is generally being applied satisfactorily, the free movement of television broadcasting services within the Community having essentially been insured."¹³⁸ However, public comment on the Directive during 2003 highlighted some shortcomings in the legislation. While the Commission found that broadband services and satellite technology have been adopted more slowly than first expected, it also explained that "a thorough revision of the Directive might be necessary to take account of technological developments and changes in the structure of the audiovisual market."¹³⁹

As the Commission reports, most of the parties commenting on the Directive favored no changes to the legislation, though a minority advised strengthening its provisions. The most frequent recommendations from those questioning the Directive's effectiveness were to introduce "an explicit quantitative objective [ranging from 51 percent to 75 percent] instead of the expression 'a majority proportion of its transmission time,'" and "clarifying the obligation by deleting the

135. Communication from the Commission to the Council, The European Parliament, the European Economic and Social Committee and the Committee of the Regions; *The Future of European Regulatory Audiovisual Policy*, COM(03)784 final. [hereinafter *The Future of European Regulatory Audiovisual Policy*].

136. COM(03)778 final. This "fourth report" should not be confused with the "Fifth Communication From the Commission to the Council and the European Parliament on the Application of Articles Four and Five of Directive 89/552/EEC," *supra* note 7. The "fourth report" deals with the Directive as a whole, while the "Fifth Communication" addresses only articles four and five. The fourth report of the Commission essentially established a schedule for continued public meetings and discussion throughout 2003. *The Future of European Regulatory Policy* is an attempt to summarize these reports and public discussions.

137. Committee on Culture, Youth, Education, the Media and Sport, Report on Television without Frontiers, EUR. PARL. DOC. (A5-0251/2003).

138. *The Future of European Regulatory Policy*, COM(03)778 final at 6.

139. *Id.* at 14.

wording '*Where practicable and by appropriate means.*'¹⁴⁰ In the end, the Commission decided to order further independent studies and scheduled focus groups to meet in 2004.¹⁴¹

The fallout from Jean-Marie Messier's tenure as Vivendi chief continues. In September of 2003, General Electric's NBC announced it was entering into exclusive negotiations with Vivendi Universal in order to precipitate a merger between the two firms.¹⁴² On October 8th, General Electric reached a final agreement to acquire Vivendi's assets.¹⁴³ The new entity, NBC Universal, will be 80% owned by General Electric with Vivendi retaining the remainder of company assets. Vivendi investors are to receive \$3.8 billion in cash through the issuance of about 125 million shares in G.E. stock, and G.E. will take on \$1.7 billion in Vivendi debt. The total value of the new enterprise is estimated at \$43 billion.¹⁴⁴ The FTC continues to review the merger, while the European Union, invoking its abbreviated merger analysis after concluding that the deal would have little effect on its markets, has already approved the action.¹⁴⁵

140. *Id.* at 17.

141. *Id.* at 24-25.

142. *See generally*, John Tagliabue, *Vivendi Posts Twenty Percent Rise in Operating Profit for First Half*, N.Y. TIMES, Sept. 25, 2003 at W1.

143. *See generally*, Bill Carter, *G.E. Finishes Vivendi Deal, Expanding Its Media Assets*, N.Y. TIMES, Oct. 9, 2003 at C1.

144. *Id.*

145. *See* Prior Notification of a Concentration (Case COMP/M.3303—GE/Vivendi Universal Entertainment), 2003 O.J. (C285) 26; Commission Notice on a Simplified Procedure for Treatment of Certain Concentrations under Council Regulation (EEC) No. 4064/89, 1989 O.J. (C 217), 29.7.2000; *see also*, *EU Regulators Clear NBC-Vivendi Deal*, N.Y. TIMES, Dec. 19, 2003 at A1. The EU's simplified antitrust procedure "clears mergers or acquisitions after one month if no objections are raised by third parties." *Id.* *See also*, Meredith Amdur, *EU Clears GE-Viv U Deal: Sale has only limited impact on Euro film and TV*, VARIETY, Dec. 21, 2003.

